NO. 91715-9

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Appellant/Cross-Respondent,

v.

FREEDOM FOUNDATION,
Respondent/Cross-Appellant,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

At issue in this appeal are the application of three provisions of the Public Records Act (PRA) and whether article I, section 7 of the Washington Constitution provides greater protection for personal privacy than the PRA.

First, the Court is asked to interpret the scope of the PRA's prohibition on disclosing lists of license-exempt child care providers where the Appellant, Service Employees International Union Local 925 (SEIU 925) asserts that the list will be used for a "commercial purpose." RCW 42.56.070(9). This is an issue of first impression. There is no guidance from any Washington appellate court as to what constitutes a commercial purpose or how an agency should determine whether a request is for a commercial purpose.

Second, the Court is asked whether the PRA's exemptions for the records of children enrolled in child care services, RCW 42.56.230(2)(ii), and welfare recipients, RCW 42.56.230(1), apply in this case. SEIU 925 argues that releasing the contact information of a child care provider necessarily discloses personal information of the children the provider cares for, including some receiving subsidized care, thereby impermissibly disclosing information protected by one or both of these exemptions. Washington State Department of Social and Health Services (DSHS) did

not apply the exemptions in responding to the public records request from Respondent Freedom Foundation, concluding instead that nothing within the four corners of the responsive records revealed personal information about children enrolled in child care services or welfare recipients.

Third, the Court is asked whether the right to privacy under article I, section 7 of the Washington Constitution provides greater protection for personal privacy than the PRA. There is no guidance from any Washington appellate court on this issue.

Lacking relevant judicial interpretations applying article I, section 7 and the statutory provisions involved in this case, DSHS determined the requested records should be produced and would have done so had it not been restrained by order of the superior court. The agency is prepared to produce the records if directed to do so by the Court.

II. STATEMENT OF THE CASE

On October 31, 2014, the Freedom Foundation requested two lists of records containing the names, mailing addresses, email addresses, and telephone numbers of license-exempt child care providers in the "Family, Friends and Neighbors" (FFN) program administered by DSHS through the Working Connections Child Care (WCCC) Program. CP 57. The first list was of any provider who received funds within the past year through the WCCC program. The second was of those providers on the first list

for whom DSHS had withheld union dues and transmitted them to SEIU 925. *Id.*

DSHS determined it had two lists responsive to the request, identifying approximately 4,500 FFN providers. CP 50. DSHS did not identify any exemption that would block disclosure of the requested records.

FFN providers are paid through a child care subsidy under the WCCC program. WAC 170-290-0135. FFN providers are paid for child care for eligible families during approved activities such as work, training, educational programs and Temporary Assistance to Needy Families-approved activities. FFNs are individuals who have applied to and been approved by DSHS to provide child care. *Id.* DSHS authorizes child care and pays providers directly under the terms contained in the bargaining agreement negotiated pursuant to RCW 41.56.028. The FFNs' bargaining representative is SEIU 925. CP 292. FFNs are selected by and receive daily direction from the care recipient's custodian, but they are paid for their work directly by DSHS.

On November 24, 2014, DSHS notified SEIU 925 of the records request, as authorized in RCW 42.56.540, and informed SEIU 925 that DSHS would release the records unless SEIU 925 obtained a court order enjoining their release. CP 55. SEIU 925 filed a Complaint on December

11, 2014, to enjoin DSHS from releasing the two lists. CP 6-16. On December 19, 2014, the trial court granted a Temporary Restraining Order, scheduled a hearing on Preliminary Injunction for January 9, 2015, and notified the parties that the preliminary injunction hearing would be consolidated with a hearing on the merits pursuant to Civil Rule 65(a). CP 376, 580.

At the close of the January 9, 2015, hearing, the trial court denied SEIU 925's requests for a preliminary injunction and a permanent injunction and continued the temporary restraining order to give SEIU 925 an opportunity to file an appeal. CP 588-59. These rulings were memorialized in a written Order entered on May 1, 2015. CP 578-89.

SEIU 925 timely filed its appeal with Division II of the Court of Appeals and obtained an Order extending the temporary restraining order. The Freedom Foundation petitioned for direct review to the Supreme Court. The temporary restraining order remains in place.

III. ARGUMENT

A. Standard of Review

Judicial review of agency action under the PRA, including application of an exemption, is de novo. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v Office of Atty. Gen.*, 177

Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on SEIU 925.

In general, a trial court's decision whether to grant an injunction is reviewed for abuse of discretion. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994). To obtain injunctive relief—preliminary or permanent—SEIU 925 must establish the same three basic requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against which it seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Kucera,* 140 Wn.2d at 200. If SEIU 925 fails to satisfy any one of these three requirements, the injunction generally should be denied. *Federal Way Family Physicians v. Tacoma Stands Up for Life,* 106 Wn.2d 261, 265, 721 P.2d 946, 948 (1986). At the preliminary injunction hearing, the moving party need only establish the *likelihood* that it will ultimately prevail on the merits—not the ultimate right to a permanent injunction. *Tyler Pipe Indus., Inc. v. State Dep't of Rev.*, 96 Wn.2d 785, 793, 638 P.2d 1213, 1217 (1982).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court's power to enjoin production of a record under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190, 194 (2011). "Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905, 910 (2014).

B. The Meaning of Commercial Purpose in RCW 42.56.070(9) Is a Question of First Impression for Washington Appellate Courts

The first issue in this case, which Washington appellate courts have never addressed before, is how to interpret RCW 42.56.070(9), which provides in pertinent part: "This chapter shall not be construed as giving authority to any agency . . . to give, sell or provide access to lists of individuals requested *for commercial purposes*, and agencies . . . shall not do so unless specifically authorized or directed by law . . . ." (Emphasis added). The PRA does not define "commercial purposes."

The PRA establishes a presumption that all public records must be made available upon request unless the record falls within a specific

statutory exemption or prohibition. RCW 42.56.070(1), .550. It is well established that exemptions are to be construed narrowly and construed in favor of partial disclosure where possible. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 902, 346 P.3d 737, 740 (2015). This Court has not applied that same narrow construction to statutory prohibitions on disclosure. In *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 525, 326 P.3d 688, 693 (2014), for example, the Court stated that "other statutes" incorporated in RCW 42.56.070(1) "may *exempt or prohibit* disclosure of certain records or information," and the next sentence does not include *prohibitions* on disclosure when applying narrow construction: "[a]ll *exceptions*, including 'other statute' exceptions, are construed narrowly" (emphasis added). There is nothing in the statute or case law that establishes whether RCW 42.56.070(9), which is written in the language of a prohibition (an agency "shall not" release a list of individuals requested for commercial purposes unless otherwise authorized by law), is intended to be narrowly construed like exemptions within the PRA.

1. The Statute and Case Law Provide No Guidance as to How an Agency Is to Determine Whether a Public Records Request Is for a Commercial Purpose.

As a general rule, agencies "shall not distinguish among persons requesting records, and such persons shall not be required to provide

information as to the purpose for the request." RCW 42.56.080; *King Cnty. v. Sheehan*, 114 Wn. App. 325, 336, 57 P.3d 307, 313 (2002). The commercial purposes prohibition in RCW 42.56.070(9) is specifically called out as an exception to that general rule. RCW 42.56.080. But the PRA does not provide any guidance as to how an agency is to divine the intended use behind a public records request. Here, DSHS received the request at issue in an email from Jami Lund, Senior Policy Analyst for the Freedom Foundation. The request does not indicate why Mr. Lund is making the request or the intended use.

In the absence of case law construing this statute and without any guidance in the PRA, DSHS was left to make its own determination whether to explore the requester's intent. An Attorney General Opinion in 1988 suggested that a nonbinding affirmation from the requester that the intended use of a record is for a non-commercial purpose is sufficient. Atty. Gen. Op. 12 (1988). If that approach is not satisfactory, under what standard and based on what facts should a public records officer be making conclusions regarding commercial purpose? How does a records officer know that further inquiry is necessary to determine if the requester has a commercial purpose? In other contexts, the Court has instructed that an agency should not look beyond the four corners of a requested document to determine whether an exemption applies. *See, e.g.*,

Bainbridge, 172 Wn.2d at 414 (2011) ("An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity."); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162, 166 (2006) (even though the exemption protects "[i]nformation revealing the identity of child victims of sexual assault," the city could not withhold the record to protect the child's identity where the requester asked for that specific child's record; the city could do no more than redact the identity of the victim who already was known to the requester). But that approach is not generally workable in this context, since it is the requester's purpose that is at issue. Looking within the "four corners" of a requested list usually allows, at most, only a speculative conclusion as to the requester's intent—it does not conclusively determine whether the requester intends to use the list for a commercial purpose.

Neither the statute nor case law provides guidance as to how and under what circumstances an agency should determine whether the requester has a commercial purpose. Based on the four corners of the request in this case, there was nothing to trigger further inquiry into whether a commercial purpose existed.[1]

[1] SEIU 925 asserts the Freedom Foundation will use the records for a commercial purpose. To the extent SEIU 925 contends it put DSHS on notice of the Freedom Foundation's commercial intent sufficient to trigger a duty on the agency to

2. Attorney General Opinions Suggest That a Commercial Purpose Is Present Where the Requester's Objective Is Clearly to Gain an Economic Benefit by Using the Records.

Although no court opinion has construed RCW 42.56.070(9) and 42.56.080 as they apply to commercial purposes, there are five Attorney General Opinions that discuss how the commercial purpose provision could be applied. The first Opinion was issued the year after the PRA was passed by initiative of the people in November 1972. In an opinion dated December 12, 1973, the Attorney General looked only at the question of what is a "list" of individuals requested for commercial purposes. Atty. Gen. Ltr. Op. 113 (1973) (available at http://www.atg.wa.gov/ago-opinions/public-utility-districts) (citing former RCW 42.17.260(5), now codified as RCW 42.56.070(9)). The Opinion determined the law precluded access to "lists" which are prepared by the agency having custody of the record, but permitted the agency to provide access to raw records from which the requester could create their own "list." Atty. Gen. Ltr. Op. 113 at 2. In the present case there is no apparent dispute that the records at issue are lists prepared by the agency.

The second Opinion, dated April 7, 1975, dealt with a welcome service that requested from a public utility district the names of

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inquire, that contention is not supported by case law or the statute. Both are silent as to what information should trigger an agency's inquiry into whether a particular request is for a commercial purpose.

individuals new to the area in order to contact them and tell them about local services. Atty. Gen. Ltr. Op. 38 (1975) (available at http://www.atg.wa.gov/ago-opinions/access-lists-individuals). The Opinion concluded that, based on the facts as stated, the lists requested would be for commercial purposes, because the apparent purpose of the request was to "facilitate contacts with the new residents in question to make them aware of their new surroundings, to solicit their participation in community activities, *and to make them aware of business commercial entities and their services in the area.*" *Id.*

Another Opinion issued later that year, on July 17, 1975, went into more depth about what could be a commercial purpose under the statute. Atty. Gen. Op. 15 (1975) (available at http://www.atg.wa.gov/ago-opinions/access-lists-individuals-under-initiative-no-276) (cited by SEIU 925 App. Br. at 14). The Opinion began with two general observations: first, that the commercial purpose provision does not prohibit access to raw data from which a person could construct a list of individuals for commercial purposes (citing Atty. Gen. Ltr. Op. 113 (1973)); and second, that the commercial purpose provision should be narrowly construed to be consistent with the policy declaration in former RCW 42.17.020 (that the

statute is intended to *open up* access to public records). Atty. Gen. Op. 15 at 7.[2]

Relying primarily on dictionary definitions in the absence of any legislative definition, the Opinion concluded a "commercial purpose" is "an intent to use the list of individuals in such a manner as to facilitate commercial activity." *Id.* at 10. Applying that definition, the Opinion described the statute as intended to prohibit an agency from

> supplying the names of natural persons in list form when the person requesting such information from the public records of the agency intends to use it to contact or in some way personally affect the individuals identified on the list and when the purpose of the contact would be to facilitate that person's commercial activities.

Id. at 10.

The next relevant Opinion, dated June 8, 1988, restated the Attorney General's interpretations thus far as a three-part test:

> [S]tate agencies shall not provide a list of the names of natural persons (not including corporations, associations, etc.) when the list was created by the agency, and (a) the requester is engaged in a commercial (profit-expecting) activity, (b) the requester intends to contact or in some way personally affect the listed individuals, and (c) the purpose of the contact is to facilitate the commercial activity.

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[2] The policy statements contained in former RCW 42.17.020 now are codified in RCW 42.17A.001 (compare RCW 42.17A.001 with Laws of 1973, ch. 1, § 2). Their focus is on the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates.

Atty. Gen. Op. 12 (1988) at 10 n.4 (available at http://www.atg.wa.gov/ago-opinions/confidential-income-information). The Opinion concluded that an agency "must ask an individual who is requesting access to a list of names whether the list will be used for commercial purposes." *Id.* at 11. It also suggested that an agency could require the person requesting access to a list to provide a written representation that the list will not be used for commercial purposes in violation of the statute, observing that "[t]he statute itself prohibits the agency from providing the list of names for commercial purposes, and we believe that requiring the requester to provide a written assurance to that effect does not add a burden to access that would be impermissible under the statute." *Id.* At the same time, the Opinion acknowledged that the agency lacks authority to act in response to a requester who, despite any assurances made to the agency, uses the list for commercial purposes. *Id.*

The most recent Attorney General Opinion, dated January 27, 1998, reiterated the need to look to the dictionary when terms are not legislatively defined, and started with the definition first derived in 1975. Atty. Gen. Op. 15 (1998) at 2-3 (available at http://www.atg.wa.gov/ago-opinions/authority-public-agencies-allow-inspection-and-copying-lists-individuals). Finding no definitional limits on the scope of the term "commercial purpose," the Opinion disagreed that the commercial purpose

provision was limited to situations in which individuals are directly contacted or personally affected. *Id.* at 4.

The Opinion buttressed its conclusion by citing *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), in which the Court read the broad language of former RCW 42.17.310(1)(d) (now RCW 42.56.240(1)) as providing a temporary "categorical exemption" for all records contained in open investigative files. *Newman*, 133 Wn.2d at 574-75. The Court found "[a]n inherent clash exists between the PDA's[3] presumption and preference for disclosure, prior case law requiring a narrow interpretation of exemptions, and the broad language of the exemption." *Id.* at 572 (quoted in Atty. Gen. Op. 15 (1998) at 3). The Court resolved the clash by not applying the presumption of disclosure to the records covered by that categorical exemption—since the statute did not limit the scope of the exemption, the investigative files exemption was not to be read narrowly, but instead authorized the agency to categorically withhold the entire record. *Newman,* at 574-75. The 1998 Attorney General Opinion reasoned that the exemption now codified at RCW 42.56.070(9), like the exemption at issue in *Newman*, is a broadly stated,

[3] The statutes governing the disclosure of public records and the financing of political campaigns and lobbying and the financial affairs of elected officials were referred to as the Public Disclosure Act (PDA) until the 2005 Legislature relocated the public records provisions into a new chapter, RCW 42.56, referred to as the Public Records Act, where they currently are codified.

categorical prohibition, containing no language that narrows the definition of a commercial purpose. Atty. Gen. Op. 15 (1998) at 4.

3. Authorities From Other Jurisdictions Provide Useful Guidance in Interpreting the Commercial Purpose Provision.

A few other states and the federal Freedom of Information Act (FOIA) have statutes comparable to RCW 42.56.070(9), which may be helpful to this Court in interpreting our statute.

a. Other States' Public Disclosure Laws.

Arizona's broad public records mandate contains a narrow "commercial purpose" exception. Under Arizona law, a commercial purpose exists when a requester intends to use the public record:

> for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.

Ariz. Rev. Stat. § 39-121.03 (2014). This language is specifically "aimed at the direct economic exploitation of public records, not at the use of information gathered from public records in one's trade or business." *Star Pub. Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837 (Ariz. Ct. App. 1993). In that case, the Arizona Court of Appeals held that a newspaper

publisher's request for autopsy reports was not for a commercial purpose. The court recognized that information gleaned from public records might have indirect commercial value to the newspaper as news, but such indirect value was not enough to constitute a commercial purpose. To read commercial purpose any more broadly would be "inconsistent with the whole tenor of the public record statutes to make access freely available so that public criticism of governmental activity may be fostered . . . ." *Star Pub. Co.*, 178 Ariz. at 605.

California law is similar. It provides that, "[a]n individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless such action is specifically authorized by law." Cal. Civil Code § 1798.60. "Commercial purpose" is defined in statute to mean "any purpose which has financial gain as a major object. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster." Cal. Civil Code § 1798.3(j). But it is not clear how this definition is applied. The California Constitution (Art. I, § 3(2)) includes a provision mandating broad construction of statutes providing access to public records and narrow construction of statutes that limit access. However, a companion statute to those just cited says, "[T]he provisions of this chapter shall be liberally construed so as to protect the rights of privacy arising under this chapter or under the Federal or State

Constitution." Cal. Civil Code § 1798.63. We have found no California decision attempting to apply these provisions.

Kansas law prohibits anyone from giving name/address lists from public records "for the purpose of selling or offering for sale any property or service." Kan. Stat. Ann. § 45-230(a). When a request is for information that the requester intends to sell, Kansas may withhold records. In *Data Tree, LLC v. Meek*, 279 Kan. 445, 109 P.3d 1226 (2005), the Kansas Supreme Court considered whether a county Register of Deeds was required to honor an information broker's request for certain personally identifying records. As in Washington, the Kansas Court started with a presumption in favor of disclosure and a narrow reading of any exceptions. *Id.* at 454-55. And, as in Washington, the statute did not define "commercial purpose." The Kansas Court held that the requester's apparent intent to gather and sell facts obtained from public records constituted a commercial purpose:

> [T]he information being sought by Data Tree is not for its public notice properties but for commercial purposes, *i.e.* the sale of the information to business interests which have no relationship to the transaction recorded. The public interest to be served by releasing unredacted documents with social security numbers, mothers' maiden names, and dates of births to a data collection company which intends to sell this information for a profit is at best insignificant.

Id. at 462. The court concluded that fulfilling Data Tree's request would be an unwarranted invasion of personal privacy. *Id.* at 462-63.

b. Federal Freedom of Information Act.

Because federal cases have examined a variety of fact patterns relating to commercial purposes in the context of the federal FOIA,[4] those cases may be useful here—albeit with three caveats.

First, a court interpreting FOIA looks to "commercial benefit" in order to determine whether to award attorneys' fees—not to determine whether to disclose the record at all. 5 U.S.C. § 552(4)(A)(ii). Unlike the PRA, FOIA does not provide that a commercial purpose standing alone is a reason to withhold a record.

Second, courts interpreting FOIA typically analyze commercial benefit together with the plaintiff's interest. *See, e.g., Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1095, 296 U.S. App. D.C. 130, 133 (D.C. Cir. 1992) ("when a litigant seeks disclosure for a commercial benefit or out of other personal motives, an award of attorney's fees is generally inappropriate") (superseded on other grounds by 5 U.S.C. § 552(a)(4)(E)(i)). That analysis is not found in the PRA.

Third, FOIA balances the private benefit of disclosing the information against the public benefit. *See, e.g., Lacy v. U.S. Dep't of the*

[4] 5 U.S.C. §§ 552 *et seq.*

Navy, 593 F. Supp. 71, 76 (D. Md. 1984); *Mayock v. I.N.S.*, 736 F. Supp. 1561, 1564 (N.D. Cal. 1990); *Whalen v. I.R.S.*, 1993 WL 532506 at *5 (N.D. Ill. 1993). Again, that balancing is absent in the PRA.

(1) Purposes Generally Recognized as Commercial.

As a general rule, a FOIA request is made for a commercial purpose if the requested information, in itself, has direct pecuniary value to the requester. This is true where the requester is engaged in the business of selling the type of information requested. *Aviation Data Serv. v. F.A.A.*, 687 F.2d 1319 (10th Cir. 1982) (requester's business sold information regarding the aviation industry). It is also true where the requested information will assist the requester in setting bids or prices. *Isometrics, Inc. v. Orr*, 1987 WL 8709 (D.D.C. 1987); *Nat'l Ass'n of Med. Equip. Suppliers v. Health Care Fin. Admin.*, 1987 WL 26448 (D.D.C. 1987). *See also Guam Contractors Ass'n v. U.S. Dep't of Labor*, 570 F. Supp. 163, 169 (N.D. Cal. 1983) (contractors' association, "although nominally a non-profit organization, was the tool and surrogate litigant for various commercial entities.").

A commercial purpose also exists where the requester seeks the information in order to acquire new customers. *Nat'l Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 463 (N.D. Tex. 1980) (life insurer

sought disclosure of list of United States Postal Service employees). A commercial purpose may exist where the information tends to induce potential clients to do business with the requester. *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979) (government contracting firm obtained disclosure of auditing manual). A commercial purpose may also exist where the information would help the requester to render better service to its existing clients. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 180 U.S. App. D.C. 184 (D.C. Cir. 1977) (*overruled on other grounds recognized by Burka v. U.S. Dep't of Health and Human Servs.*, 142 F.3d 1286 (D.C. Cir. 1998).

Finally, where the requester intends to use the requested information to obtain favorable policy on the regulation of its own industry, that may be a commercial purpose under FOIA. *See Alliance for Responsible CFC Policy, Inc. v. Costle*, 631 F. Supp. 1469, 1471 (D.D.C. 1986) ("As representative of users and producers of CFCs, plaintiff clearly was motivated by their commercial interest in CFC regulation.").

(2) Purposes Generally Recognized as Non-Commercial.

Not every purpose that involves money is a commercial purpose under FOIA. For example, where an author requests information in order to write a book that will be sold commercially, the author is not

necessarily a commercial requester. *Piper v. U.S. Dep't of Justice*, 339 F. Supp. 2d 13, 22 (D.D.C. 2004). This is because "Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles." *Campbell v. U. S. Dep't of Justice*, 164 F.3d 20, 35 (D.C. Cir. 1998).

Typically, a FOIA request is not for a commercial purpose if it is made to enable scrutiny of government conduct. For example, a request for information about a high-profile public controversy is not a commercial request. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 820 F. Supp. 2d 39 (D.D.C. 2011), *subsequent determination*, 2011 WL 5830746 (D.D.C. 2011) (requester sought information about torture policies). Nor is a request for a commercial purpose where the requester is investigating allegations of governmental waste and abuse. *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851 (D. Colo. 1994). And finally, it is not a commercial purpose to critique government processes and policies. *Conservation Law Found. of New England, Inc. v. Dep't of Air Force*, 1986 WL 74352 (D. Mass. 1986).

Importantly, a policy purpose may be non-commercial even if the desired change in policy would run to the requester's commercial benefit. *Wiley, Rein & Fielding v. U.S. Dep't of Commerce*, 793 F. Supp. 360 (D.D.C. 1992). In that case, the requester sought documents to assist it in

preparing a legislative initiative to change United States policy concerning the Paris Air Show. *Id.* at 361. While recognizing that the requester "would receive a commercial benefit from a change in policy," the court nevertheless held that the request was not commercial because the requester was not seeking to *solicit business* from parties named in the documents. *Id.*

Another important type of non-commercial purpose under FOIA is informing third parties of their rights. In *Veterans Educ. Project v. Sec'y of Air Force*, 509 F. Supp. 860, 861 (D.D.C. 1981), *aff'd without published op.*, 679 F.2d 263 (D.C. Cir. 1982), the requester was a nonprofit organization created to assist veterans with less than honorable discharges. The organization requested a list of all such veterans who were eligible to apply for an upgrade in status pursuant to new standards and procedures. *Id.* The court held that the organization had no commercial purpose; rather, its "only purpose in obtaining the records was to inform veterans of their statutory rights." *Id.* at 862.

The decisions summarized above may be useful to this Court in determining how to interpret RCW 42.56.070(9), in spite of the different statutory language and, in the case of FOIA, the different reason for the inquiry. In the absence of guidance from Washington courts, none of

these decisions from other jurisdictions could mandate the proper analysis for DSHS to use in this case.

DSHS found no basis to apply the exemption in RCW 42.56.070(9) in responding to the public records requests at issue here. The definition of "commercial purpose" under RCW 42.56.070(9) in the PRA is a matter of first impression in the Washington appellate courts.

C. The Four Corners of the Record Failed to Establish the Lists of FFNs as Exempt Under RCW 42.56.230

SEIU 925 next argues that the trial court erred in denying its request for preliminary and permanent injunction, because producing the list of FFNs disclosed personal information of a child enrolled in a public program serving or pertaining to children, RCW 42.56.230(2)(a)(ii), or disclosed personal information in a file maintained for welfare beneficiaries. RCW 42.56.230(1). App. Br. at 28-36.

Washington courts have consistently directed that when an agency determines whether an exemption applies, it looks to information within the four corners of the record. *Predisik,* 182 Wn.2d at 906; *Koenig,* 158 Wn.2d at 187; *Sheehan,* 114 Wn. App. at 341. Guided by that principle, DSHS did not identify RCW 42.56.230 as an exemption applicable to the records in question. Care providers under the FFN program are required

to provide their own legal name, address and telephone number. WAC 170-290-0135(1)(a). The request identifies specific categories of FFN provider information but does not include any information specifically identifying the child receiving care.

SEIU 925 asserts that the records provide a "virtual road map to the whereabouts of children entrusted to provider's care." App. Br. at 31. But the address of a child care provider will not always be the same as the address of the child. While friends and neighbors must provide care at the child's address, family members providing care may do so at *either* the care provider's address *or* the child's address. WAC 170-290-0130(3), (4). The records do not identify whether the care providers at issue are family, friends or neighbors, nor where care is actually provided.

An agency must construe exemptions narrowly in favor of disclosure to achieve the PRA's paramount purpose of open government. *Predisik,* 182 Wn.2d at 902. Guided by that principle, DSHS did not identify either cited exemption in RCW 42.56.230 as applicable to the records in question.

1. RCW 42.56.230(2)(a)(ii): Personal Information of a Child Enrolled in a Public Program Serving or Pertaining to Children.

RCW 42.56.230(2)(a)(ii), enacted in 2010, addresses child safety concerns stemming from public records. SEIU 925 asserts that a care provider's identity is personal information of a child because a child's care undoubtedly relates to or affects the child and because the disclosure of the address identifies where the child can be found on any given day. DSHS shares the concern for child safety, but based on the information within the records, it did not find this exemption applicable because the information requested was not linked to specific children. Recent amendments to RCW 42.56.230(2)(a) provide increased protection for children and care providers by authorizing PRA exemptions for care providers' contact information if the child and the care provider have the same last name or reside at the same address. H.B. 1554, 2015 Leg., 64th Sess. (Wa. 2015). This exemption did not exist at the time of the request and therefore was not applied; in any event DSHS would be unable to assert this as a blanket exemption covering all responsive records.

2. RCW 42.56.230(2)(a)(ii): Personal Information in Files Maintained for Welfare Recipients.

RCW 42.56.230(1) exempts from disclosure any "personal information in any files maintained for . . . welfare recipients." While the

records at issue do not contain any personal information of welfare beneficiaries, SEIU 925 asserts that their release identifies or allows identification of welfare recipients. App. Br. at 34. SEIU 925 theorizes that because FFNs receive federal funds, any child receiving care by an FFN is a "welfare recipient" and therefore the lists at issue are protected. But SEIU 925 fails to show that the lists of care providers are maintained "for" the children receiving care. The records identify the care provider, not the child receiving care. They do not identify or pertain to the children and are not used directly in the care of the children. Drawing the exception narrowly, as it is required to do, DSHS did not find RCW 42.56.230(1) a viable exemption to production of the requested records.

D. The Trial Court Did Not Abuse Its Discretion by Declining to Enjoin Disclosure of Records Where the Constitution Did Not Clearly Prohibit Disclosure

Finally, SEIU 925 asserts that disclosure of the requested records would violate constitutional privacy rights. To date, no Washington appellate court has recognized the constitutional exemption SEIU advocates, and the trial court did not abuse its discretion in denying injunctive relief in the absence of any applicable appellate decision. article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded,

without authority of law." SEIU 925 argues that this language provides protection that is both independent of the PRA's own privacy provisions, and greater in scope than the Fourth Amendment to the United States Constitution. In a civil case such as this one the interest in confidentiality, or nondisclosure of personal information, has not been recognized by this Court as a fundamental right. *O'Hartigan v. Dep't of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44, 47 (1991). Where the government seeks to disclose personal information, this court has held that "the state constitution offers no greater protection than the federal constitution, which requires only application of a rational basis test." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154, 167 (1997).

Both *O'Hartigan* and *Ino Ino* addressed compelled disclosure of individuals' private information to government, not disclosure of individuals' private information by government to third persons. Without acknowledging that distinction, the Court of Appeals cited *O'Hartigan* (which dealt with compelled disclosure to government) in recognizing that "[a] person's interest in nondisclosure of intimate personal information is a constitutionally protected privacy interest under our State constitution." *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 129 Wn. App. 832, 861, 120 P.3d 616, 630 (2005), *rev'd in part on other grounds*, 164 Wn.2d 199 (2008). The Court held that the constitutional privacy interest

requires no different analysis than under the privacy definition in the PRA. *Id. O'Hartigan* did not address the PRA's privacy provision, drawn from the Restatement (2nd) of Torts, and this Court has not addressed whether the analysis should be different where a constitutional privacy claim is asserted as an exemption under the PRA.[5]

Even if Washington courts had recognized a constitutional privacy right prior to this case, DSHS likely could not have asserted it. Constitutional rights generally are personal, and DSHS would be unable to assert a caregiver or child's Constitutional rights in their stead. *See In re Marriage of Akon*, 160 Wn. App 48, 59, 248 P.3d 94, 99 (2011); *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 428, 58 L.Ed.2d 387 (1978).

In the absence of appellate precedent recognizing a constitutional privacy interest as an exemption under the PRA, the trial court did not abuse its discretion by denying SEIU 925's requests for an injunction.

IV. CONCLUSION

In responding to the public records request at issue here, DSHS found no statutory exemption that applied to the records and would have produced them to the requester had the agency not been enjoined from

[5] The information sought in this case, names and addresses, has not been considered private information under the PRA's provisions. *Sheehan*, 114 Wn. App. at 343. No case has addressed whether article I, section 7 protects such information from release by government in response to a public records request.

doing so. DSHS remains ready to produce the requested records at such time as it is permitted or directed to do so by the courts.

DSHS found no basis to apply the exemption in RCW 42.56.070(9) in responding to the public records requests at issue here. However, the definition of "commercial purpose" under RCW 42.56.070(9) in the PRA is a matter of first impression in the Washington appellate courts. This Court's guidance as to the interpretation and application of that exemption would assist state and local agencies when responding to requests for lists of individuals. This brief cites Attorney General Opinions and decisions from other state and federal courts that may assist the Court.

Based on the four corners of the records requested here, DSHS concluded that the requested records are not exempt under RCW 42.56.230(1) or 42.56.230(2)(ii). This Court should affirm that conclusion.

SEIU 925 argues for the recognition of a right to privacy under article 1, section 7 as an exemption under the PRA. To date, no Washington appellate decision has recognized that constitutional exemption in a PRA case. SEIU 925's argument presents an issue of first impression, but the constitutional right asserted is personal to individuals and not one asserted by DSHS.

RESPECTFULLY SUBMITTED this 4 day of November, 2015.

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NO. 91715-9

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925 (SEIU 925), Appellant, v. FREEDOM FOUNDATION, Respondent/Cross Appellant, and WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	CERTIFICATE OF SERVICE

I, Jane Rockwell, hereby declare under penalty of perjury under the laws of the State of Washington that on November 4, 2015, I caused the foregoing State of Washington Department of Social and Health Services Brief of Respondent to be filed with the Washington State Supreme Court, via email to supreme@courts.wa.gov and per e-mail per agreement of counsel, to the following:

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Subject: RE. No. 91715-9 Respondent DSHS Brief

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Good Afternoon,

Please find attached for filing today in Case No. 91715-9 Washington State Department of Social and Health Services Brief of Respondent, and Certificate of Service.

Please notify me immediately if you have any difficulties opening the attachment.

Respectfully,

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